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No. 191

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In the Supreme Court of the United States

OCTOBER TERM, 1950

OTTO ALBERT WILLENBUCHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE 3RD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

petition not printed

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 191

OTTO ALBERT WILLUMEIT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 13-14) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on February 23, 1950 (R. 15), and a motion to vacate and for further consideration of the appeal, filed on March 9, 1950 (R. 17-21), was denied on April 12, 1950 (R. 29). The petition

for a writ of certiorari was filed on July 10, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

After a consolidated trial as to the nature of the German-American Bund, petitioner, represented by counsel, consented, in 1944, to the entry of a denaturalization decree before the introduction of further evidence.

The question presented is whether, under the circumstances of this case, the courts below properly ruled that the denaturalization decree may not be vacated five years later under Rule 60(b) of the Federal Rules of Civil Procedure, and a hearing granted on the merits of the denaturalization complaint.

STATUTE AND RULES INVOLVED

The pertinent statute and rules involved appear in the Appendix, *infra*, pp. 11-13.

STATEMENT

In a complaint filed in the United States District Court for the Northern District of Illinois on October 1, 1942, the United States, pursuant to Section 338 of the Nationality Act of 1940, 54 Stat. 1158, 8 U.S.C. 738, *infra*, p. 11, sought to cancel petitioner's citizenship, obtained by naturalization proceedings on September 16, 1931, in an Indiana state court. Cancellation was sought on the ground that petitioner had sworn falsely when he stated that he was attached to the prin-

ciples of the Constitution of the United States, that he renounced his allegiance to the German Reich, and that he intended to reside permanently in the United States. (R. 30-33.) In a consolidated trial with eight other defendants, voluminous evidence was introduced dealing with the nature of the activities of the German-American Bund, and the trial judge made findings of fact and conclusions of law thereon in *United States* v. *Sauter*, 54 F. Supp. 22 (N.D. Ill.). The consolidated causes were then severed for the purpose of proceeding to trial as to the remaining issues. *United States* v. *Sauter*, *supra*, 54 Fed. Supp. at 23.

At the continuation of petitioner's trial on May 23, 1944, after the severance, and subsequent to the court's overruling petitioner's oral motion to dismiss on the ground that the court had no jurisdiction (R. 46) and his motion for a continuance for ten years (R. 48-52), the following occurred (R. 53-56):

> Mr. McGreal [United States Attorney]: If the Court please, case #4713 involving Otto Willumeit is, of course, one of the nine which were consolidated for trial, for the purpose of determining the organization, aims, and purposes of the German-American Bund and its related organizations or predecessor organizations.
>
> The evidence in this case will show, if the Court please, that the defendant Otto A.

Willumeit—Mr. Harrington [attorney for petitioner] just informed me that the defendant says he does not want to go ahead and wants to surrender his naturalization certificate to this court without a trial.

The Court: Is that correct, Mr. Harrington?

Mr. Harrington: Yes, I just don't want to waste the Court's time.

The Court: Step forward, Mr. Willumeit.

The Defendant: Yes, your Honor.

The Court: Is the statement just made by counsel correct?

The Defendant: Yes, your Honor.

The Court: You desire to surrender your certificate of naturalization?

The Defendant: For cancellation.

The Court: For cancellation?

The Defendant: Yes, your honor.

The Court: You do not desire to disprove the charges in the bill?

The Defendant: Yes, your honor.

Mr. McGreal: You admit and confess the charges in the bill?

The Defendant: The complaint charges that I should either surrender my citizenship certificate—that is what the complaint charges.

Mr. McGreal: You admit the charges in the bill?

The Court: Let him make a statement.

The Defendant: (Continuing)—or show cause why the cancellation should not be instituted. I merely comply with the demand

of the plaintiff, to either surrender it by default, which I am doing herewith.

The Court: By default. In order for me to enter a default decree here canceling your citizenship it is necessary or implied in the default that you admit the charges in the bill. Do you admit the charges in the bill?

The Defendant: I merely surrender my citizenship for cancellation, your Honor.

The Court: This court is competent to accept that, in view of the charges that have been made in the bill. It will be. Therefore since the defendant desires to submit his citizenship certificate for cancellation, without trial, the allegations of the complaint will be taken as confessed and judgment on the complaint will issue.

Mr. McGreal: All right, your Honor.

The Court: You will surrender your certificate to the Clerk of this Court for cancellation.

The Defendant: I will, Judge.

* * * * *

The Court: Let the decree provide that the defendant does not have possession of his certificate at the present time and, therefore, cannot physically offer it for cancellation. That the decree will further provide that when the defendant becomes possessed of the certificate, if he ever does, he will forthwith deliver it to the Clerk of this Court for cancellation, and the same is by the decree of this Court canceled.

The Defendant: Yes, your Honor.

The final decree cancelling petitioner's citizenship in accordance with his consent was entered on June 9, 1944, *nunc pro tunc*, May 23, 1944 (R. 57-62).

A petition for rehearing as to this final decree was filed on November 7, 1946 (R. 63-66) and denied on December 5, 1946 (R. 73). On September 25, 1947, petitioner's appeal from this order was dismissed because of his failure to file notice of appeal within three months of December 5, 1946 (R. 13, 74-75). On June 6, 1949, petitioner filed a petition for reconsideration of the December 5, 1946, order denying the petition for rehearing (R. 76-78), but this was overruled on the same day (R. 79). Petitioner appealed from this order on July 11, 1949 (R. 80), after which the Court of Appeals, in a *per curiam* opinion (R. 13-14), ordered the appeal dismissed on February 23, 1950 (R. 15). Petitioner's motion to vacate this order and for further consideration of the appeal (R. 17-21) was denied on April 12, 1950 (R. 29).

ARGUMENT

1. Petitioner contends that his case is governed by *Klapprott* v. *United States*, 335 U. S. 601, judgment modified, 336 U. S. 942, and that he was entitled to vacation of the denaturalization decree and a hearing on the merits of the original complaint. The argument is that because it was entered without the Government introducing evidence fully supporting the denaturalization complaint, the de-

cree was vulnerable and could be vacated, there not having been adduced the clear and unequivocal proof requisite for denaturalization. (Pet. 3, 4, 6, 9, 11-12.)

Petitioner mistakenly assumes that the *Klapprott* case holds that in denaturalization proceedings evidence must always be introduced to support the allegations of the complaint (Pet. 9, 11). For a majority of the Court held to the contrary, and the modified judgment in that case implicitly rejected the minority views as stated in the opinions of Mr. Justice Black and Mr. Justice Rutledge. Cf. *United States* v. *Eichenlaub*, 180 F. 2d 314, 316 (C. A. 2), certiorari denied, 339 U. S. 983; *United States* v. *Borchers*, 163 F. 2d 347, 349-350 (C. A. 2), certiorari denied, 332 U. S. 811; *United States ex rel. Stabler* v. *Watkins*, 168 F. 2d 883, 885 (C. A. 2). While in a contested denaturalization case, under *Baumgartner* v. *United States*, 322 U. S. 665, 670, and *Schneiderman* v. *United States*, 320 U. S. 118, 125, "proof to bring about a loss of citizenship must be clear and unequivocal," this rule "was not uttered in relation to default judgments." *United States* v. *Borchers*, *supra*, 163 F. 2d at 349-350.[1]

[1] While petitioner asserts that the denaturalization decree here under attack was not entered with his consent (Pet. 3), the record unequivocally shows otherwise (R. 53-56; *supra*, pp. 4-6). Also in another case involving petitioner, *Eichenlaub* v. *Shaughnessy*, 338 U. S. 521, 525, this Court expressly recognized his consent: "In 1944, with his consent, a judgment was entered in the United States District Court for the Northern District of Illinois canceling his citizenship on the ground of fraud in its procurement."

2. The court below properly held that petitioner cannot bring his case under Rule 60(b) of the Federal Rules of Civil Procedure, *infra*, pp. 12-13, on the ground that his position was "unusual in nature and extraordinary" (see Pet. 3, 16). The decree of denaturalization, as the Court of Appeals held, was "not obtained by mistake, inadvertence, surprise, or excusable neglect," but only after petitioner and his counsel "announced in open court, upon explicit questioning by the court, that [petitioner] did not desire to contest the petition of the government but agreed that the court might enter a judgment canceling his certificate of naturalization" (R. 14). The mere fact that petitioner was imprisoned could not of itself excuse his failure to take steps to set aside the denaturalization decree. *Klapprott* v. *United States*, *supra*, dissenting opinion of Mr. Justice Frankfurter, 335 U. S. at 629. Further, despite his handicaps, he did engage in extensive litigation with a view toward preventing his deportation. See *Eichenlaub* v. *Shaughnessy*, 338 U. S. 521. As the court below pointed out by reference to its decision in *United States* v. *Geisler*, 174 F. 2d 992, 998, (C. A. 7), certiorari denied, 338 U. S. 861, this case differs basically from *Klapprott's* in that here the petitioner was personally before the denaturalization court and was vigorously represented by counsel who unsuccessfully advanced each and every contention now offered as ground for this col-

lateral attack. Compare R. 47-52, with R. 76-78.[2] Even construed most liberally, Rule 60 (b), as amended, was never intended to afford an opportunity for such flagrant relitigation.

3. The decision in the directly analogous case of *United States* v. *Eichenlaub*,[3] 180 F. 2d 314 (C.A. 2), certiorari denied, 339 U. S. 983, should control. There the Second Circuit rejected the contention that *Klapprott* supported the proposition that consent to a denaturalization judgment is "insufficient as a substitute for proof to support the judgment." After recognizing the rule that clear and convincing evidence was necessary for a denaturalization decree, the court held that "equivalent to proof is a consent to the entry of judgment given by a defendant with the knowledge and consent of an attorney representing him." Continuing, the court stated that, even assuming the case "was governed by the same principles as criminal cases, the same result must follow, for a plea of guilty or a plea of *nolo contendere* to a criminal charge makes unnecessary the introduction of evidence by the prosecution, and a consent judgment in denaturalization proceedings must be considered the equivalent of such pleas, or one of them." 180 F. 2d at 316. Since virtually the same contentions were made in the petition for certiorari in that case as are made in this, this

[2] These circumstances serve also to distinguish the cases reported under the title *United States* v. *Backofen*, 176 F. 2d 263 (C.A. 3).

[3] See pp. 6-8 of our brief in that case, O.T. 1949, No. 788.

Court's denial of certiorari there indicates that the same course should be taken in this case.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1950.

APPENDIX

Section 338 of the Nationality Act of 1940, c. 876, 54 Stat. 1137, 1158, 8 U. S. C. 738, provides:

> (a) It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 301 in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured.
>
> (b) The party to whom was granted the naturalization alleged to have been fraudulently or illegally procured shall, in any such proceedings under subsection (a) of this section, have sixty days' personal notice in which to make answer to the petition of the United States; and if such naturalized person be absent from the United States or from the judicial district in which such person last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State or the place where such suit is brought.

Rule 60(b) of the Federal Rules of Civil Procedure, prior to its amendments effective March 19, 1948, and October 20, 1949, provided:

> On motion the court, upon such terms as are just, may relieve a party or his legal repre-

sentative from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. The motion shall be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order, or proceeding, or (2) to set aside within one year, as provided in Section 57 of the Judicial Code, U. S. C., Title 28, § 118, a judgment obtained against a defendant not actually personally notified.

Rule 60(b), as amended, provides:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the

judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U. S. C. §1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

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